INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
ORDINANCE INVOLVED	4
STATEMENT OF THE CASE	5
PROCEEDINGS BELOW	5
SUMMARY OF EVIDENCE	6
FEDERAL QUESTIONS RAISED	16
REASONS FOR GRANTING THE WRIT	20
CONCLUSION	30
CERTIFICATE OF SERVICE	31
APPENDIX A — OPINION OF FLORIDA DISTRICT COURT OF APPEAL	App. 1
APPENDIX B — OPINION OF FLORIDA CIRCUIT COURT	App. 2
APPENDIX C — FLORIDA STATUTE, Sec. 847.011	App. 3
FLORIDA STATUTE, Sec. 847.02	App. 8
FLORIDA STATUTE, Sec. 847.03	App. 9

CASES CITED

Page

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts (Fanny Hill case), 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed. 2d 1 ..... 20, 24, 26, 27

A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 85 S.Ct. 1723, 12 L.Ed. 2d 809 ..... 27, 29

Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed. 2d 584 ..... 21, 24, 27

Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412 21

Callender v. State (Fla. 1966) 181 So. 2d 529 3

Dresner v. City of Tallahassee (Fla. 1964) 164 So. 2d 208 ..... 2, 3

Ellison v. City of Fort Lauderdale (Fla. 1966) 183 So. 2d 193 2

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 ..... 27, 29

Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942 16 L.Ed. 2d 31 ..... 20, 24, 26, 27

Grove Press v. Gerstein, 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 2d 1035 25

Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 ..... 20, 21, 22, 24, 25, 26, 27

CASES CITED (Continued)

Page

Kingsley International Pictures Corp. v. Regents, 360 U. S. 684, 79 S.Ct. 1362, 3 L.Ed. 2d 1512 27

Marcus v. Search Warrants of Property, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 1127 ..... 27, 28, 30

Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed. 2d 56 ..... 20, 26, 27

Poe v. Ullman, 376 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989 25

Robinson v. State (Fla. 1961) 132 So. 2d 3 3

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 ..... 20, 21, 24, 26, 27

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205 24

Tralins v. Gerstein, 378 U.S. 576, 84 S.Ct. 1903, 12 L.Ed. 2d 1033 25

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment To The Constitution of The United States ..... 3 et. seq.

Florida Constitution, Art. 5, Sec. 4(2) 2

STATUTORY PROVISIONS AND RULES

	Pages
Title 28, United States Code, sec. 1257(3)	2
Florida Statute, sec. 847.011	4 et. seq.
Florida Statute, sec. 847.02	28
Florida Statute, sec. 847.03	28
Florida Appellate Rules #2.1a(5)(b)	2
Florida Appellate Rules #4.5c(6)	2

ORDINANCE

City of Miami Code, Ch. 43, Sec. 38 ..... 4 et. seq:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No.

MARCEL FORT,

Petitioner,

vs.

THE CITY OF MIAMI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the Third District of Florida entered in the above-entitled cause on January 18, 1967.

OPINIONS BELOW

The finding of guilt by the Municipal Court of the City of Miami was accompanied by no opinion; the trial court's ruling is set forth in the "Statement of the Case" infra. The Judgment of Affirmance of the Circuit Court

of the Eleventh Judicial Circuit in and for Dade County, Florida, is unreported and appears as Appendix B,* infra. The Judgment of the District Court of Appeal of Florida, Third District, denying certiorari is as yet unreported and appears as Appendix A, infra.

JURISDICTION

The final judgment of the Florida District Court of Appeal was entered on January 18, 1967 (Tr. 215, App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, sec. 1257(3), petitioner having asserted in the courts below rights to freedom of expression conferred by the Fourteenth Amendment to the Constitution of the United States.

The Florida District Court of Appeal, in denying the petition for common-law certiorari, effectively affirmed the judgment below (upholding petitioner's conviction under a City of Miami Ordinance for possessing obscene sculpture with intent to sell it) by holding that the decision of the Circuit Court did not deviate from essential requirements of law. See **Dresner v. City of Tallahassee**, Fla. 1964, 164 So. 2d 208, 210 and **Ellison v. City of Fort Lauderdale**, Fla. 1966, 183 So. 2d 193, 194. Said Florida District Court of Appeal is the highest state court in which a decision could be had in the case at bar since neither appeal nor certiorari lies to the Florida Supreme Court under Art. 5 sec. 4(2) of the Florida Constitution and Florida Appellate Rules #2.1a (5)(b) and 4.5c (6), and the Florida Supreme Court is no longer empowered to issue writs of common-

*"App." symbolizes Appendix herein and "Tr" the Certified Transcript accompanying the Petition for Certiorari. All emphasis in quoted material is provided by counsel unless stated otherwise.

law certiorari. See **Dresner v. City of Tallahassee, supra,** at 210, **Robinson v. State,** Fla. 1961, 132 So.2d 3, 5, and **Callendar v. State,** Fla. 1966, 181 So. 2d 529, 532.

QUESTIONS PRESENTED

1. WAS THE MIAMI ORDINANCE PROHIBITING THE POSSESSION-OF-OBSCENE-STATUES, ETC. UNCONSTITUTIONALLY APPLIED TO PETITIONER AS THE STATUES IN QUESTION ARE NOT OBSCENE AND ARE PROTECTED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

2. IS THE MIAMI ORDINANCE UNCONSTITUTIONAL ON ITS FACE UNDER THE FOURTEENTH AMENDMENT WITH REFERENCE TO THE LIMITED "APPEAL TO PRURIENT INTEREST" TEST FOR DETERMINING OBSCENITY?

3. IS THE MIAMI ORDINANCE UNCONSTITUTIONAL ON ITS FACE AND/OR WAS IT UNCONSTITUTIONALLY APPLIED UNDER THE FOURTEENTH AMENDMENT WITH REFERENCE TO THE SEIZURE AND CONFISCATION OF THE STATUES WITH NO WARRANT, ADVERSARY PROCEEDING, OR JUDICIAL DETERMINATION OF OBSCENITY?

ORDINANCE INVOLVED

The Ordinance involved, City of Miami Code Ch. 43, sec. 38, states as follows:

> "It shall be unlawful to commit, within the limits of the city, any act which is recognized by the laws of the state as a misdemeanor set out in Florida Statutes, excepting therefrom those misdemeanors set out in Chapter 855 of Florida Statutes, 1957."
>
> (Code, 1945, ch. 35, sec. 36; Ord. 5493 sec. 1, 1-4-56).

Florida Statutes, sec. 847.011 (Laws 1961, c. 61-7, secs. 1-11) is lengthy and is set forth **in toto** in Appendix C, **infra.** Subsection (1)(a) makes it a misdemeanor to distribute obscene materials or to have them in one's "possession, custody, or control with intent to sell." Subsection (6) negates any right of property in materials possessed in violation of the section, directs law enforcement officers seizing obscene materials to deliver them to the trial court, and compels destruction of materials found to violate the section. Subsection (10) states as follows:

> "For the purposes of this section the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

STATEMENT OF THE CASE
Proceedings Below

The case at bar began on August 11, 1965, when Petitioner Fort was arrested for allegedly violating the City of Miami Code, Ch. 43, sec. 38 (which adopts Florida Statute Sec. 847.011[1], by knowingly having in his possession, custody or control with intent to sell obscene or lewd and lascivious figures or images (Tr. 27, 199). The arrest was made without a warrant and solely on the basis of the arresting officers' opinion that six statues sculpted by Petitioner and exhibited for sale in his back yard were obscene (Tr. 41 et. seq.).

At the time of the arrest, the six statues were confiscated and delivered to the Property Bureau of the Police Station (Tr. 55). The confiscation also took place without a warrant; no judicial determination of the alleged obscenity of the statues was made until defendant's trial, for violating the Miami Ordinance, three weeks after the confiscation (Tr. 199).

Petitioner Fort pleaded Not Guilty (Tr. 27, 199) and the case came to trial on September 1, 1965 before the Honorable Arthur Massey, Municipal Judge of the City of Miami Municipal Court (Tr. 24 et. seq.). Testimony and exhibits presented are discussed in the "Summary of Evidence," **infra.**

The trial court found Petitioner guilty of violating the Ordinance and imposed a one hundred dollar fine

[1]City of Miami Code, Ch. 43, sec. 38, is hereinafter referred to as "the Miami Ordinance" and said Ordinance's adoption or incorporation of Florida Statutes Sec. 847.011 is automatically understood.

(Tr. 194-195, 199) or, in default of payment, imprisonment in the City Jail for 40 days (Tr. 199).

Petitioner appealed to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (Tr. 19-23, 200) which affirmed the judgment below (Tr. 202).

Petitioner petitioned the District Court of Appeal, Third District of Florida, for a writ of common law certiorari (Tr. 205-214). Said court denied certiorari on January 18, 1967 (Tr. 215).

Pursuant to the parties' stipulation, the Florida District Court of Appeal (1) ordered the existing Bond continued in force throughout proceedings in this Court and (2) permitted removal from the Court file of the original photographs of the statues as well as of three of the statues themselves for inclusion in the record before this Court, counsel for Petitioner being "charged with the duty" of having said photographs and statues returned to the Florida District Court of Appeal following this Court's final determination in the certiorari proceedings (Tr. 216).[2]

Summary of Evidence

1. The City's Case

The City of Miami produced only two witnesses at trial, Sergeant Quinn and Policeman Matta, the arresting

[2]Petitioner is forwarding to this Court the Certified Transcript (including poor copies of the photographs). The Clerk of the District Court of Appeal has elected to forward the original photographs directly to the Supreme Court of the United States. The three statutes will be sent to this Court as soon as Petitioner and Respondent can make the necessary arrangements.

officers, who were present at the simultaneous confiscation of the statues. The City introduced into evidence twelve (12) photographs of the statues taken at the scene of the arrest by a city employee (City's Exhibit #1, Tr. 45, 53-56) and the six statues themselves (City's Exhibits #2, 3, 4, 5, 6 and 7, Tr. 96). It should be noted that all testimony at trial referring to the statues as #1, 2, 3, 4, 5, and 6 refer to City's Exhibits #2, 3, 4, 5, 6, and 7 respectively, i.e., the number used by the witness is one less than the official "City's Exhibit" number of each statue.

Sergeant Quinn testified that he arrested Petitioner on August 11, 1965 because, in his opinion, the six life-size statues lined up on Petitioner's lawn, his backyard behind his home at the intersection of South Dixie Highway and Bridgeport Avenue, were pornographic (Tr. 42, 44, 46, 52, 181). The statues were in a 25 foot by 50 foot area with a sign at each end saying "Art for Sale. $25 and up" (Tr. 44). The statues were 50 to 75 feet from the edge of the highway (Tr. 42) and "they were fully exposed to the highway" (Tr. 44, 52). After "qualifying" himself solely on the basis of his age, 45, and his 15 years on the police force (Tr. 42)[3], Sergeant Quinn described each statue in terms of sexual relations, practices, and/or organs (Tr. 47-52). He deemed the statues pornographic because "When I got there, there were little girls looking at them and I ran them off for that reason" (Tr. 46). Pictures were taken of the statues (Tr. 54-56, City's Exh. #1). The statues were then confiscated in Sergeant Quinn's presence and delivered to the Property

[3]Over Petitioner's objection, such qualification was held sufficient. Counsel for the City stated as follows: "He established his qualifications. He is an adult and an experienced police officer . . . That is the basis of qualifying. Why should it be any more?" (Tr. 56)

Bureau of the Police Station (Tr. 55). (The statues were admitted into evidence at trial, Tr. 55-56, 96, forwarded to the Circuit Court as part of the record on appeal, and to the District Court of Appeal on certiorari, Tr. 203-204; three of the statues will be forwarded to this Court shortly, Tr. 216).

Cross-examination elicited the following testimony concerning Sergeant Quinn's qualifications, "expert" opinion, and basis for such opinion. Sergeant Quinn either "read" or "saw" the statue in question prior to the arrest (Tr. 57, 58) but he did not know if it included a test for determination of what is obscene or not (Tr. 58, 59). To his mind, however, "there was a test" which he used as follows:

> "There was a young girl looking at it. It embarrassed me and I asked her to leave and I thought of my own 12-year-old daughter looking at it and that was the test. That made me believe that I did not want any children looking at it." (Tr. 59)

Another part of the arresting officer's test was his "personal opinion" that the statues "definitely... should not be in public" (Tr. 59, 60). An additional test Sergeant Quinn applied was "just thinking about what the artist had on his mind," something Quinn "knew," something which was "obvious" to him (Tr. 62). Sergeant Quinn's art experience was limited to a high school art-appreciation course. He had seen pictures of statues by Michelangelo, but he had never heard of his "David" nor seen a picture of it, nor had he seen pictures of any sculpture by Rodin (Tr. 60, 61, 64). The only statues he had seen

were "(s)ome religious statues," and he could not "recall which ones" (Tr. 64). Sergeant Quinn did not know what books are for sale on Dade County bookstands, and had never read books like "Candy" or "A River of Lions"; he started to read "Tropic of Cancer" but stopped as it was "obscene" and "not worth reading" (Tr. 71-72). He was unfamiliar with "Pleasure Was My Business," "The Memoirs of Fanny Hill" and "The Perfumed Garden" and was unaware that any of these books were on sale throughout Dade County (Tr. 73). He was not familiar with the book "Kama Kala" (Tr. 72-73). He was similarly unfamiliar with "The Circle of Love" and other movies in the Miami area (Tr. 76-77). Sergeant Quinn, a Catholic, admitted that his "knowledge of the community would be restricted to the Catholic Church area where there are limitations on what you can read and see as far as movies" (Tr. 74-76). Sergeant Quinn testified that in the phrase "contemporary community standard" the word "community" refers to "the people that made up the City of Miami" and the word "contemporary... means things that are accepted" (Tr. 70). Sergeant Quinn was totally unable to state whether or not he was "familiar with the contemporary community standard, even using... [his] definition, of the City of Miami" because he could not understand the question! (Tr. 70-71). When asked to point out any male or female genital organ on any of the statues, Sergeant Quinn could not do so and finally admitted that not one was visible (Tr. 64-79). In conclusion, Sergeant Quinn testified that he "did **not** weigh any possible artistic merits" of the statues; he then responded, with clear inconsistency, that in his opinion "there was some artistic merit but it did not outweigh the obscenity" (Tr. 77-78).

Officer Matta never had "any occasion to make an arrest based on obscenity" during his nine (9) years with the police department prior to the arrest in question. In his opinion the statues are pornographic as they "represent ... a sex relation of sorts" (Tr. 79-80). Officer Matta was not aware of the language of the statute involved (Tr. 81). Officer Matta is Catholic (Tr. 84). The first "test" of obscenity he applied was that "I wouldn't put one of these in church." Other tests were the opinion of "(f)our people that had a few words to say" and the fact that he talked to four children in the area (age 12 to 18) who were giggling and laughing and whom he told "to move on" (Tr. 82-83). He was as unfamiliar as Sergeant Quinn was with various books on sale in Dade County or read throughout the United States (Tr. 83-84), as well as with Michelangelo's "David" (Tr. 84-85). He admitted that defendant's statues do not show either male or female genital organs (Tr. 86). He had no art training whatsoever (Tr. 89). When asked "whether any of these statues have any artistic value," Officer Matta replied, "I am not qualified to answer ... I don't know." He made no determination of whether or not "they have artistic value" before deciding that they were obscene (Tr. 92). The concluding portion of Officer Matta's testimony follows:

> "Q (Mr. Thomas, City's attorney) — All of these things (the 6 statues) are just fiberglas. They just represent certain things to you?
> "A Yes.
>
> "THE COURT So your arrest solely is based on the thought process of what these statutes supposedly represent in relationship to sexual act?
> "A Yes.

"THE COURT Next Witness.

"Mr. Thomas That is the City's case."

(Tr. 94-95)

2. Petitioner's Case

Petitioner presented the testimony of three highly qualified expert witnesses as well as his own testimony.

Eugene Massin, Associate Professor of Art at the University of Miami, not only studied art at various universities but is also a practicing painter. He was first assistant to David Siqueiros, "one of the triumverate of Mexican muralists"; he won numerous prizes or awards and he has exhibited in various museums throughout the world including the Metropolitan Museum of Art and the Modern Museum in New York (Tr. 102-104). Professor Massin testified that so-called "erotic art or relationship to love as a theme in art has been practiced by the artists ... since the beginning of time" including scenes of sexual intercourse, and other sexual practices (Tr. 105-106). Today's artists deal with sexual themes no more than previously (Tr. 106). The artist "cannot exist in a society where at times he is given restrictions as to choice of subject matter, manner of production and presentation" (Tr. 107). In Professor Massin's "opinion as an artist, no art can be pornographic, not if it is art" (Tr. 109) and the statues in question "are a series of designs which are part of an art form" (Tr. 111). He values the statues "esthetically as a series of designs functioning in space"; he sees "no recognizable forms" and the statues, to him, "are structures based on a concept of the artist which is individual and which is his right to express" (Tr. 112).

Other people might view the statues as dealing with sexual matter as the "eye of the beholder" varies (Tr. 111). Professor Massin stated that "without having a preconceived idea" the two figures in one of the statues could "look like a cross, a spider or whathaveyou" and that the City's Attorney's conclusion depended upon his "preconceived" idea (the City's Attorney then stated that to him the statues symbolized "various perverted types of sexual perversions") (Tr. 117-118). Professor Massin had driven by the statues on the highway many times with his wife and children and did not find the statues offensive (Tr. 118-119). In response to questions by the trial court, Professor Massin testified that (1) it is not possible for statues to be "art . . . in a private place and institution . . . and at the same time . . . be classified as obscene in a public place as to the community as a whole," (2) children do not deem sculpture "obscene" unless it is presented as such to them by an adult, and (3) the public display of the statues in question would not affect the morals of the community (Tr. 120-121). Professor Massin defines pornography as "a particular visual experience in the eye of the beholder" (Tr. 108). He deemed himself incapable of determining whether or not something is "pornographic" but qualified to determine whether or not something is art (Tr. 108-109). In his expert opinion, the statues are definitely art (Tr. 111, 117, 119) and are not "prurient" (Tr. 116).

Jack Painter, Assistant Professor of Philosophy at the University of Miami, who specializes in esthetics and semantics (Tr. 125), testified that he saw Rodin's statue in a Paris museum (Def. Exh. #1), that it is an accepted work of art and that he has seen statues of similar figures

throughout the United States (Tr. 128-129). In his opinion, Petitioner "has used the sexual theme in an artistic manner" in the statues in question and the statues are "works of art" (Tr. 131). Professor Painter noted three definitions of art, (1) "the object must show evidence of individual creative expression," (2) "a work of art is a significant form," and (3) "a work of art is that object which produces a harmonious response." He demonstrated that defendant's statues are art under all three definitions (Tr. 132-133). He rejected classifying the statues as prurient or pornographic because they do not contain "abnormal appeal to the sexual" and they do have "energy, grace and balance" (Tr. 133, 142, 143). While approving of the Miami Ordinance itself (Tr. 137-138) Professor Painter did not deem the statues to come under it. Similarly, while agreeing with the City's Attorney that "there is a difference between an open highway and a museum," Professor Painter criticized the museums for taking art away from the public. In his opinion, art should not be "stored away in the museums" but should be "a part of our public life and in our homes and even in our public places" (Tr. 140-149). The determination of obscenity cannot depend on whether the sculpture is on private or public display (Tr. 147). Although "a certain segment" might consider the statues obscene, that "does not make it obscene" (Tr. 146) and Professor Painter feels the statues in question "should be on display" (Tr. 148).

J. A. Kapchan, Doctor of Philosophy and Psychology, Associate Professor of Social Science and Psychology at the University of Miami, and practicing clinical psychologist (Tr. 149-150) testified that he is familiar with the United States Supreme Court **Roth** test, is familiar with contemporary community standards in the field of sex,

and is familiar with various books dealing with sex (including "Tropic of Cancer" and "Pleasure Was My Business") now being sold and read in Dade County (Tr. 150-151). In his expert opinion, applying the **Roth** test, the statues in question "are not obscene" (Tr. 156-157). Things that are "highly symbolic and abstract" and "works of considerable complexity and depth" are not "'hardcore pornography or dirt for dirt's sake" and "don't have much of an aphrodisiac effect on people." Dr. Kapchan "had driven by Mr. Fort's place many times... [and had] not even seen" the statues (Tr. 157). In Dr. Kapchan's opinion, it makes no difference in determining obscenity whether an object is "on the public highway or in your closet," although "suppression... tend(s) to create more of a prurient interest in the public than... display..." (Tr. 158). Public display of the statues in question would have a "salubrious" rather than a "deleterious effect on the morality of this community" (Tr. 159). Dr. Kapchan did not deem himself qualified to evaluate the statues "artistically" because he is not an artist. He testified, however, that the statues have social importance with respect to the response of individuals who look at them and have potential social importance as possible diagnostic aids in clinical psychology (Tr. 160-161). The effect of the statues would depend on the individual viewer (Tr. 168). The City's Attorney stated that he could see nothing in Exhibit No. 6 but a specific form of sexual perversion and then asked Dr. Kapchan "What else could it be...?" Dr. Kapchan responded: "It could be people ballet dancing. It could be two fully clothed people with a man embracing his wife or a lot of things." (Tr. 169) Dr. Kapchan compared the fact that different people see "a wide variety of things" in the Rorschach tests (Tr. 170).

Marcel Fort, the Petitioner herein and defendant at trial, testified that he has been a professional artist since 1937 (Tr. 174-175). He studied art in the Beaux Arts, Paris, France, and has exhibited his paintings in the Caribbean and America, in Miami and in New York. His work has been advertised in reputable art journals including the "Art International," the "Jardin des Arts," and "Gallery des Arts" and "Le Jardin de Joie" (Tr. 175) With reference to themes he has painted, Petitioner testified that "at the beginning I was very representative, very objective, and as a creative artist I was not satisfied and always when I master one style, I abandon it and start to thinking about another style and I always am evoluting that way from one style to another." (Tr. 176). Petitioner had done landscape work, portrait work, still lifes, and pure abstract work (Tr. 176). He was commissioned to do the fourteen stations of the Cross... [by the] Catholic Church in Nassau... the Church of St. Paul and St. Peter and the paintings are still there now... displayed in the Church" (Tr. 178).

Petitioner was born in Paris, France. He lived in Paris until the war, was wounded as an officer for a mine sweeper in the middle east, and was a civilian for the remainder of the war (Tr. 178, 183). He has been an American citizen for about four years, and has lived in America about 10 years, having been a resident of the Fontainebleau for the first year (Tr. 178, 176). The "emotion of love or emotion of sex" has always interested Petitioner, and he started working in this area about four years ago. He did reading in the field, including the book "Kama Kala" which can be bought in Dade County at Burdine's (Tr. 176-177). He was also influenced by Rodin, Piscasso, other artists in New York and France, and erotic

sculpture, including Italian church art (Tr. 177-178). In Davie, Florida, four or five months before his arrest, Petitioner "was commissioned to make a 12 foot Buddha for a movie studio which . . . [he] made out of fiberglas." This was his first work in sculpture and it inspired Petitioner to make the fiberglas statues involved in the case at bar. Petitioner created City's Exhs. #2-7 over a period of two months and finished the statues a few weeks before the trial (Tr. 178-179). Petitioner continued the themes he had previously been working on in painting in the sculpture form. He moved from one medium to the other "to try to express myself in a way it would not offensive" (Tr. 179). He made the statues in question in order "to be creative." He created the statues "for artistic motives" and not to take advantage of a sexual market. "I don't sell sex, I sell art." (Tr. 180) Petitioner exhibited not only the statues but also various paintings of his for sale in his back yard (Tr. 181). Petitioner intended to symbolize "the emotion of love" when he sculpted the statues; in his opinion, the statues "will promote love" and deal with "normal love" (Tr. 183).

3. The City's Rebuttal

The City presented no evidence in rebuttal.

Federal Questions Raised

Petitioner unsuccessfully asserted his rights under the Fourteenth Amendment to the Constitution of the United States at all appropriate stages of the proceedings below.

One week after his arrest, Petitioner filed a Motion

to Suppress Evidence and to Quash the Complaint (Tr. 3-5). Shortly thereafter Petitioner filed a Supplemental Motion to Quash the Complaint (Tr. 1-2):

Question 1. presented herein, (i.e., the unconstitutional application of the Miami Ordinance to the statues as they are not obscene), was raised in ground 1 of the Supplemental Motion (Tr. 1); see, also ground 8 of the original Motion (Tr. 3).

Question 2. presented herein, (i.e., the unconstitutionality of the Ordinance on its face in view of its limited test for determining obscenity) was raised in ground 2 of the Supplemental Motion (Tr. 1), as well as grounds 6 and 3 of the original Motion (Tr. 3, 4).

Question 3. presented herein, (i.e., the unconstitutionality of the Ordinance on its face and/or as applied with reference to the statues' summary seizure and confiscation without warrant, adversary proceeding, or judicial determination of obscenity) was raised by grounds 1 through 8 of the original Motion (Tr. 3-5).

The Municipal Court initially reserved ruling on these Motions (Tr. 40, see, also 28-39). Following Petitioner's reiteration of the grounds therein at the close of the City's case (Tr. 96 et. seq.), the trial court denied both the Motion to Suppress the Evidence and Quash the Complaint and the Supplemental Motion to Quash the Complaint (Tr. 101).

At the close of the City's case, Petitioner moved to dismiss all of the charges on the grounds stated in its prior Motions to suppress and quash, as well as the further

ground that the City failed to establish a prima facie case (Tr. 96-100). The motion was denied by the trial court (Tr. 101), as was Petitioner's contention that he should be acquitted at the end of all the evidence presented at trial (Tr. 184-192, 194).

The trial court's finding follows:

"THE COURT: Mr. Fort, will you come forward, please.

"I think that a certain segment of our society probably would believe that your work is not obscene no matter where it may be and I think that also you would have the right at all times to create as you see fit, especially in private. I do not think that you intended purposely to commit a crime but we do have a City ordinance here and it is my job to see whether or not you have violated the City ordinance itself. Whether or not the ordinance is constitutional or not, I do not know, but my sole job is to determine whether or not this ordinance has been violated and the ordinance has been violated in the sense that I think that your work has been on public display and the City has proven that it is obscene, it is lewd, as far as public display is concerned, as stated solely under the ordinance so I am not the expert to determine whether or not it is obscene but under this ordinance you are guilty and the Court will find you guilty and assess a fine of one hundred dollars." (Tr. 194-195)

Petitioner's Motion for New Trial again raised the constitutional issues and was also denied (Tr. 196).

Petitioner contended on appeal to the Circuit Court that the Miami Ordinance was (see Question 1 herein) unconstitutional as applied to convict defendant for displaying the sculpture in question, Assignments of Error #15, Tr. 21-22, (see Question 2 herein) unconstitutional on its face with reference to its definition or test of obscenity, Assignments of Error #11, 12 and 16, Tr. 21-22, and (see Question 3 herein) unconstitutional on its face as applied with reference to the seizure and confiscation of the sculpture, Assignments of Error #10, 13, and 14, Tr. 21.

The Circuit Court affirmed "the findings and sentence of the Municipal Court of Miami" on August 5, 1966, with no exposition of or comment upon the issues in the case (Tr. 202, App. B).

Petitioner's petition for writ of common-law certiorari filed in the Florida District Court of Appeal (Tr. 205-214) asserted that the Circuit Court's affirmance of his conviction deviated from and was contrary to essential requirements of law in three ways: Paragraph 6a of the Petition raised **Question 1** presented herein (Tr. 209-210); Paragraph 6b corresponded to **Question 2** (Tr. 210); and Paragraph 6c raised **Question 3** (Tr. 211). In each instance petitioner asserted his deprivation of constitutional rights and explicitly set forth the decisions of this Court upon which he relied.

The Florida District Court of Appeal denied certi-

orari without opinion on January 18, 1967, the day following oral argument (Tr. 215, App. A).

REASONS FOR GRANTING OF WRIT

1. (Question 1) The decisions below, applying the Miami Ordinance to Petitioner on the ground that the statues are obscene and thus not protected by the Fourteenth Amendment to the Constitution of the United States, conflict with the required tests for determining obscenity as set forth in **Roth v. United States,** 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1948, **Jacobellis v. Ohio,** 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed 2d 793, and **A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts** (hereinafter called the **Fanny Hill** case), 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed 2d 1.[4]

The required tests for obscenity are set forth as follows in the **Fanny Hill** case, **supra,** 383 U.S. at 418, 419, 420, 86 S.Ct. at 977, 978, 16 L.Ed. 2d at 5, 6 (opinion of Mr. Justice Brennan in which Mr. Chief Justice Warren and Mr. Justice Fortas joined:[5]

> "We defined obscenity in **Roth** in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole

[4]The "pandering" test involved in the *Fanny Hill* case, *supra*, as in *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed. 2d 56, and *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed. 2d 31, has no relevance herein as neither evidence nor intimation of erotic advertisement or distribution is present in the case at bar.

[5]See section 2 of "Reasons . . .", *infra*, noting less restrictive views of Mr. Justices Stewart, Black and Douglas.

> appeals to prurient interest.' 354 U.S. at 489, 77 S.Ct. at 1311. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value...
>
> "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness... [even if the material has] only a modicum of social value..."

See also **Jacobellis v. Ohio,** 378 U.S. 184, 191, 192, 84 S. Ct. 1676, 1680, 12 L.Ed. 2d 793, 799, 800 (opinion of Mr. Justice Brennan in which Mr. Justice Goldberg joined), adding that under the third test " 'the portrayal of sex... in art'... [or] in a manner that advocates ideas or that has artistic value or any other form of social importance may not be branded as obscenity and denied the constitutional protection..." It is clear that under the first test (concerning appeal to prurient interest) the average man refers to the average adult and not to children. **Roth v. United States, supra,** 354 U.S. at 490, 77 S.Ct. at 1312, 1 L.Ed.2d at 1510, **Bantam Books v. Sullivan,** 372 U.S. 58, 71, 83 S.Ct. 631, 640, 9 L.Ed. 2d 584, 594, **Butler v. Michigan,** 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed. 2d 412.

Clearly the statues in question and the pictures of the statues[6] are the best evidence before this Court on the issue of obscenity and constitutional protection. Describing counsels' positive reaction to the statues would be presumptuous, but noting the testimony[7] at trial is of value since the trial court relied exclusively thereon.

The testimony presented by the City's only two witnesses, Sergeant Quinn and Officer Matta, clearly established the fact that **both based their opinions of "obscenity" on totally constitutionally invalid bases,** i.e., the alleged effect of the statues on **children,** and their alleged appropriateness in **church.** Both were totally unfamiliar with the "appeal to prurient interest" test specifically and literally incorporated in the Miami Ordinance, both were totally unfamiliar with art and sculpture as well as with contemporary community standards, and both officers deemed the City of Miami, rather than the national United States, as the "community" in question.[8] In Sergeant Quinn's opinion, the statues **had** "some artistic merit but it did not outweigh the obscenity." In Officer Matta's own opinion, he was completely unqualified to determine whether or not the statues had any artistic value and he therefore did not even consider any possible artistic value of the statues before deciding that they were obscene.

Testimony on Petitioner's behalf evoked the constitutional protection discussed previously. Three highly quali-

---

[6]Counsel's heightened response to the statues as compared to the pictures, especially in view of the statues' texture and appeal to the tactile sense, prompted forwarding of several of the statues to this Court in spite of the expense involved.

[7]All relevant evidence is noted with citations to the Certified Transcript in "Statement of the Case, Summary of the Evidence," *supra.*

[8]See *Jacobellis v. Ohio, supra,* 378 U.S. at 192-195, 84 S.Ct. at 1680-1682, 12 L.Ed. 2d at 801-802.

fied experts testified to the statues' lack of obscenity under each of the three constitutional tests, namely, absence of appeal to prurient interest, existence within the limits of customary candor, and presence of redeeming social importance. Professor Massin and Professor Painter explained in detail their expert opinions that the statues in question are works of art and are not obscene. Doctor Kapchan explained in detail his expert opinion that the statues have potential social importance as diagnostic aids in clinical psychology and are not obscene. All three stated that in their expert opinions the obscenity of material could not depend on its location in a public rather than a private place. Petitioner's own testimony established his long-time-status as a professional artist, a sincere and capable professional painter whose work has been exhibited in reputable museums in the United States and elsewhere and whose religious paintings are presently displayed in a Nassau Catholic Church. Petitioner attempted to express "the emotion of love" in the six statues and one measure of his artistic ability is the fact that the experts found energy, grace, balance and other attributes of art in his mere second attempt at sculpture. Obviously Petitioner's desire to express "the emotion of love" rather than to restrict himself to Buddhas-for-movies is commendable.

The trial court's finding of guilty was based on completely erroneous legal conclusions concerning its function in the case at bar and the significance of the evidence presented. The trial court based its finding on the following conclusion: "The City has proven that it is obscene, it is lewd, as far as public display is concerned... so I am not the expert to determine whether or not it is obscene ..." (Tr. 194-195). In the first place no decision of this

Court of which counsel is aware so much as intimates that material can be constitutionally protected for **private display** and yet **in and of itself** "obscene ... as far as **public display** is concerned." Indeed, this Court has clearly held that freedom of expression encompasses not only creation or utterance of the material, but also its free or commercial circulation or dissemination so long as no "pandering" is proven. See the **Fanny Hill** case, **supra, Ginzburg v. United States, supra,** 383 U.S. at 474, 86 S.Ct. at 949, 16 L.Ed. 2d at 40, **Smith v. California,** 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed. 2d 205, 209, **Bantam Books vs. Sullivan, supra,** 372 U.S. at 66, 83 S.Ct. at 636, 9 L.Ed. 2d at 590 Secondly, the trial court explicitly refused to adjudicate the "issue of constitutional law" involved in a determination of obscenity and "treated [the issue] as a purely factual judgment..." **Jacobellis v. Ohio, supra,** 378 U.S. at 187, 188, 84 S.Ct. at 1678, 12 L.Ed. 2d at 797, 798, relying on **Roth v. United States, supra,** 354 U.S. at 497-498 (separate opinion); see also the **Fanny Hill** case, **supra,** 383 U.S. at 418-421, 86 S.Ct. at 977-979, 16 L.Ed. 2d at 5-7. Thirdly, as shown previously, the police officers' testimony on the City's behalf was constitutionally irrelevant to the issue of obscenity.

The basis for the Circuit Court's affirmance of the trial court's conviction of petitioner is unknown, as are the reasons for the District Court of Appeal's denial of certiorari, because said courts did not see fit to write opinions herein.

Within the past few years, this Court has summarily reversed Dade County's banning of two books as obscene,

"Pleasure Was My Business" and "Tropic of Cancer,"[9] in view of the Fourteenth Amendment's protection of freedom of expression. **Tralins v. Gerstein,** 378 U.S. 576, 84 S.Ct. 1903, 12 L.Ed. 2d 1033, and **Grove Press v. Gerstein,** 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed. 2d 1035, per curiam decisions in which the five Justices in favor of granting certiorari and reversal relied on their **Jacobellis v. Ohio** opinions. Petitioner submits that the six statues involved herein have been similarly unconstitutionally banned.

Although to counsels' knowledge no decision of this Court has involved **sculpture** banned as obscene, it would seem clear that such form of art is entitled to the same protection as literature and motion pictures. As stated in **Poe v. Ullman,** 376 U.S. 497, 514, 81 S.Ct. 1752, 1761, 6 L.Ed. 2d 989, 1002 (dissenting opinion of Mr. Justice Douglas), "the artist whose creation is in oil or clay or marble... [is among those who] are beneficiaries of freedom of expression." Petitioner, whose artistic creations are sculpted in fiberglas, submits that the vitally important constitutional protection extends to (1) his and other sculptors' right to create and communicate thusly and (2) the public's right to receive and enjoy such three-dimensional expression.

2. (Question 2) The decisions below, upholding the constitutionality of the Miami Ordinance on its face in spite of its sole and exclusive "appeal to prurient inter-

[9]In the case at bar Sergeant Quinn testified that he never finished reading "Tropic of Cancer" as he deemed it "obscene" and he was completely unfamiliar with "Pleasure Was My Business." Officer Matta never read "Tropic of Cancer" at all.

est" test for determining obscenity, conflict with this Court's opinions in **Roth v. United States, supra, Jacobellis v. Ohio, supra,** and the **Fanny Hill** case, **supra,** setting forth three tests which must all be met before suppression occurs. The Ordinance equates obscenity with appeal to prurient interest, giving no recognition to the "patent offensiveness" (or "beyond customary limits of candor") and social importance tests. The Ordinance thus permits banning and destruction of material which meets the prurient interest requirement even though such material does not go substantially beyond customary limits of candor or has some redeeming social importance.

Petitioner is of course aware that the "fourteen separate opinions handed down in these three cases,"[10] **Fanny Hill, Mishkin** and **Ginzburg, supra,** a little over a year ago reveal sharp disagreements among the Justices of this Court concerning the proper constitutional tests for obscenity. As a majority of this Court affords constitutional protection to material not meeting the three tests set forth above (such majority including one Justice who would extend protection to all material but hard-core pornography[11] and two Justices who would extend protection to all material expressing ideas[12]), Petitioner has urged the unconstitutionality of the Miami Ordinance in failing to include the three tests.

Petitioner also respectfully urges that this Court reconsider adopting a "clear and present danger" test for all so-called obscene materials, a test extending constitutional

[10] *Ginzburg v. U. S., supra,* 383 U.S. at 480-481, 86 S.Ct. at 952, 16 L.Ed. 2d at 44 (dissenting opinion of Mr. Justice Black).

[11] See e.g. *Ginzburg v. U. S., supra,* 383 U. S. at 499, 86 S.Ct. at 957, 16 L.Ed. 2d at 54 (dissenting opinion of Mr. Justice Stewart).

protection to all expression not "brigaded with illegal action."[12]

3. (Question 3) The decisions below, upholding the seizure and confiscation of the statues in question by the arresting officers on the basis of their own opinions of obscenity and with no warrant or judicial adversary proceeding to determine the issue of obscenity, conflict with this Court's decisions in **Marcus v. Search Warrants of Property**, 367 U.S. 717, 81 S.Ct 1708, 6 L.Ed. 2d 1127, **A Quantity of Copies of Books v. Kansas**, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed. 2d 809, **Freedman v. Maryland**, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649, and **Bantam Books v. Sullivan**, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed. 2d 584.[13]

The Miami Ordinance involved, Ch. 43, sec. 38 incor-

---

[12]See the *Fanny Hill* case, *supra*, 383 U.S. at 424, 86 S.Ct. at 980, 16 L.Ed. 2d at 9 (concurring opinion of Mr. Justice Douglas); *Roth v. United States*, *supra*, 354 U.S. at 507, 77 S.Ct. at 1321, 1 L.Ed. 2d at 1520 (dissenting opinion of Mr. Justice Douglas with whom Mr. Justice Black concurred); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 690, 79 S.Ct. 1362, 1370, 3 L.Ed. 2d 1512, 1517 (concurring opinion of Mr. Justice Douglas in which Mr. Justice Black joined); *Jacobellis v. Ohio*, *supra*, 378 U.S. at 196, 84 S.Ct. at 1682, 12 L.Ed. 2d at 803 (separate opinion of Mr. Justice Black with whom Mr. Justice Douglas concurred; *Mishkin v. New York*, *supra*, 383 U.S. at 515, 86 S.Ct. at 968, 16 L.Ed. 2d at 968 (dissenting opinion of Mr. Justice Black); *Ginzburg v. U.S. supra*, 383 U.S. at 476, 482, 86 S.Ct. at 950, 969, 16 L.Ed. 2d at 41, 45 (dissenting opinions of Mr. Justices Black and Douglas, respectively).

[13]The record was held insufficient to raise this issue in *Mishkin v. New York*, *supra*, 383 U.S. at 513, 86 S.Ct. at 966, 16 L.Ed. 2d at 64, unlike the record in the case at bar (see "Statement of the Case, Federal Questions Raised," *supra*.

porates or adopts Florida Statute Sec. 847.011(6) (Appendix C **infra**) which permits seizure and confiscation of any material deemed obscene under the statute (and **a fortiori** under the Miami Ordinance) "by any authorized law officer . . ." as well as Florida Statute Sec. 847.03 (Appendix C **infra**) which requires an arresting officer under Sec. 847.011 to seize the alleged obscene material and take it into custody.[14]

The Miami Ordinance permitted, and the arresting officers in the case at bar accomplished thereunder, seizure and confiscation of the statues without a warrant, without any judicial determination of obscenity, without any notice to Petitioner to present evidence on his behalf, and without any basis for the seizure and confiscation other than the arresting officers' personal opinions; i.e., the personal opinions of unqualified policemen relying on personal feelings concerning what's good for children and church.

In **Marcus v. Search Warrants of Property, supra,** this Court held unconstitutional police officers' seizure of material as obscene, without notice to the owners or adversary hearing, pursuant to warrants issued purely on the basis of the officers' opinion of obscenity:

> "It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the

[14]See also secs. 847.011(7) and 847.02 Appendix C *infra*, which are not involved in the case at bar but which also permit unconstitutional seizure and confiscation.

> constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." (367 U.S. at 731, 732, 81 S.Ct. at 1716, 6 L.Ed. 2d at 1136)
>
> "A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailable as against the contrary judgment of the police officer who seizes it from him." (367 U.S. at 737, 81 S.Ct. at 1719, 6 L.Ed. 2d at 1139)

Similarly, in **A Quantity of Books v. Kansas, supra,** this Court held that "in not first affording P-K (the distributor) an adversary hearing, the procedure leading to the seizure order was constitutionally deficient . . ." (opinion of Mr. Justice Brennan in which Mr. Chief Justice Warren and Mr. Justices White and Goldberg joined, 378 U.S. at 210, 84 S.Ct. at 1726, 12 L.Ed. 2d at 813). As stated in **Freedman v. Maryland, supra,** holding a Maryland movie censorship statute unconstitutional, "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . ." (380 U.S. at 58, 85 S.Ct. at 738, 739, 13 L.Ed. 2d at 654).

In the **A Quantity of Copies of Books** case, **supra,** 378 U.S. at 212, 213, 84 S.Ct. at 1727, 12 L.Ed. 2d at 814, this Court reversed the judgment based on a finding of obscenity "since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights . . ." (quoting from and relying

on **Marcus v. Search Warrants of Property, supra,** 367 U.S. at 788, 81 S.Ct. at 1719, 6 L.Ed. 2d at 1140).

Petitioner submits that the unconstitutionality of the Miami Ordinance on its face and as applied in the case at bar with reference to the seizure and confiscation of the statues involved requires reversal of Petitioner's conviction and sentence as well as return of the statues to Petitioner whether the statues are or are not "obscene."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted, the decisions below reversed and the statues returned to Petitioner.

Respectfully submitted,

By _____
IRMA ROBBINS FEDER

RICHARD YALE FEDER
312 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

JOSEPH C. SEGOR
395 N. W. 1st Street
Miami, Florida
Of Counsel

CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 12, 1967, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent by mailing a copy thereof in a duly addressed envelope to JACK R. RICE, JR., City Attorney, and JOHN G. THOMAS, Assistant City Attorney, 65 S. W. First Street, Miami, Florida 33130.

.....

IRMA ROBBINS FEDER
312 Biscayne Building
Miami, Florida 33130
Attorney for Petitioner